Supreme Court, U.S.
FILED
FEB 14 2002
CLERK

(4)

No. 01-918

IN THE

Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

SAMUEL S. LIONEL
DAVID N. FREDERICK
LIONEL, SAWYER & COLLINS
1700 Bank of Amer. Plaza
300 South Fourth Street
Las Vegas, NV 89101
(702) 383-8888

WILLIAM T. COLEMAN, JR.
WALTER E. DELLINGER
(*Counsel of Record*)
SRI SRINIVASAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioner

15 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW 2

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS AND IS INCORRECT ON THE MERITS 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001).....9

Craigo v. Circus-Circus Ents., 786 P.2d 22 (Nev. 1990).....7

Evans v. Newton, 382 U.S. 296 (1966).....8

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).....8, 10

Hudgens v. NLRB, 424 U.S. 507 (1976).....10

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995).....9

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).....5

Marsh v. Alabama, 326 U.S. 501 (1946).....9

Rendell-Baker v. Kohn, 457 U.S. 830 (1982).....5

S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243 (Nev. 2001).....3, 4, 7

Stranahan v. Fred Meyer, Inc., 11 P.3d 228 (Or. 2000).....5

United Auto Workers, Inc. v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995).....5

STATUTES

Nev. Rev. St. § 278.0203(2).....6

OTHER MATERIALS

Steve Sebelius, *The politics of sidewalks*, Las Vegas Review-Journal (Jan. 3, 2002).....7

Elizabeth Amon, *Sidewalk spat*, Nat'l Law Journal (Jan. 28, 2002), at A1 2

REPLY BRIEF FOR PETITIONER

The Ninth Circuit's opinion below brushes aside one of the most basic and essential distinctions in constitutional law: between state action, which is subject to the First and Fourteenth Amendments, and private action, which is not. According to the Ninth Circuit, a strictly private entity is constrained by the First Amendment when controlling expressive activity on its own property whenever the property is thought to bear a physical and functional resemblance to a government-controlled "public forum." That conclusion, as the petition explains, conflicts with decisions of other courts recognizing that "public forum" doctrine is irrelevant to the antecedent question of state action, and also with decisions of this Court and other courts establishing that a private entity's control of expressive activity on its own property is subject to the First Amendment only in exceptional situations approaching the equivalent of a "company town."

All of that goes largely unchallenged by the Unions and ACLU in their briefs in opposition.[1] The Unions and ACLU do not defend the Ninth Circuit's misconceived reliance on public forum doctrine. Nor do they mount any serious effort to reconcile the opinion below with decisions of other courts on the issue of when a private entity's control of expressive activity on its private property can be said to constitute state action. Instead, the principal argument of the Unions and ACLU is that this case raises no issue of state action at all. They submit that the 1999 Agreement between Venetian and the State strips Venetian of its rights as property owner to control protests and picketing on its private sidewalk; and that this case therefore turns on the terms of that agreement, not on the question whether Venetian can be considered a

[1] The Government Officials have not filed a brief opposing the grant of certiorari, in accordance with their position throughout this litigation that they are neutral and will abide by any eventual judicial resolution of the constitutional status of Venetian's private sidewalk.

government actor constrained by the First Amendment.

That argument is unavailing. The dispositive question addressed and resolved by the opinions below is whether Venetian's control of expressive activity on its private sidewalk is subject to the First Amendment – in particular, the First Amendment standards that apply to governmental restrictions of speech in a government-controlled "public forum." This case thus squarely raises the state action issue presented in the petition. Significantly, that is so under any interpretation of the 1999 Agreement: a decision of the Nevada Supreme Court directly on point establishes that, even under the construction of that agreement pressed by the Unions and ACLU, Venetian *still* retains its property rights under Nevada law to control the use of its private sidewalk for expressive activity. Any restraint on Venetian's rights as property owner to control expressive activity on its sidewalk thus could only arise by operation of the First Amendment. Far from presenting a fact-specific question of contract interpretation, then, this case raises a highly significant issue of constitutional law, one as to which the opinion below is deeply flawed, sweeping in its implications, in conflict with decisions of other courts, and ripe for this Court's review.

I. THIS CASE SQUARELY PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The ACLU has stated that "the issues in th[is] case could conceivably have profound implications for free speech, not just here in Nevada, but nationwide." Elizabeth Amon, *Sidewalk spat*, Nat'l Law Journal (Jan. 28, 2002), at A1. But the ACLU and Unions describe the case quite differently in their briefs in opposition, submitting that it turns on the fact-specific terms of the 1999 Agreement and so presents no issue of broad significance. *See* ACLU Opp. 5-8; Unions Opp. 6. That argument is without merit.

1. Venetian filed this action seeking a declaratory judg-

ment that its private sidewalk cannot be considered a "public forum" for First Amendment activity, and the ACLU filed a counterclaim for a declaration that the private sidewalk is a "public forum" under the First Amendment.[2] Venetian's contention throughout this litigation has been that, as a private entity, its control of its own private sidewalk is not subject to First Amendment constraints; and that question is dispositive in both opinions below. But the ACLU and Unions now submit that there is no need to address whether the First Amendment constrains Venetian's efforts to control protests on its private sidewalk, asserting that Venetian – as a result of the 1999 Agreement – lacks any property right to control expressive activity on its sidewalk in the first place. *See* Unions Opp. 7-8; ACLU Opp. 8-9.

That assertion is squarely foreclosed by the Nevada Supreme Court's controlling decision in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). There, the casino owner of a private sidewalk had explicitly conveyed to the public a "pedestrian easement" on the sidewalk, *see id.* at 245, but the court held that, as a matter of Nevada property law, the easement did not affect the casino's entitlement as property owner to prohibit handbilling and leafleting on its sidewalk, *see id.* at 246-47. The court found that the "existence of the easement does not implicate the protections of the First Amendment" and is "insufficient to convert private property to a public forum" for expressive activity. *Id.* at 246. The concurring opinion expressed no disagreement with that understanding of Nevada law. Instead, the concurrence embraced the rationale of the district court opinion in

---

[2] The Unions appear to believe that Venetian seeks injunctive relief, *see* Unions Opp. 7, but the complaint only requests a declaratory judgment. Venetian sought a preliminary injunction in the district court, but that request became moot upon the court's entry of judgment on Venetian's underlying claims (and on the ACLU's counterclaim) for declaratory relief. Those claims are in issue here.

this case, *see id.* at 252 (Maupin, C.J., concurring), which holds that Venetian *retains* its state law rights as property owner to control expressive activity on its private sidewalk, *see* Pet. App. 56a-57a, but that its efforts in that regard constitute government action and so are subject to First Amendment requirements, *see id.* at 57a-60a.

As a result, even accepting the view of the Unions and ACLU that the 1999 Agreement dedicates a pedestrian right-of-way to the public, *S.O.C.* settles that Venetian *still* possesses its full state law rights as private property owner to control the use of its private sidewalk for expressive activity. Any limitation on Venetian's property rights in that regard thus could arise only by operation of the First Amendment, squarely and necessarily raising the question of state action presented in the petition. And as the petition explains (*see* Pet. 11-19), the Ninth Circuit's flawed approach to the question of state action warrants this Court's review: the central failing of the opinion below, and the reason it conflicts with decisions of other courts, is that it jumps to an application of public forum doctrine without first undertaking any conventional inquiry into state action. Because the need to establish state action arises regardless of how one construes the 1999 Agreement, addressing the Ninth Circuit's misconceived reliance on public forum doctrine and rectifying its failure to apply the traditional tests for state action would not involve interpreting the agreement's terms.

In addition, the Ninth Circuit's construction of the 1999 Agreement was just one of several factors that led the court to determine that Venetian is subject to the First Amendment when controlling protests on its private sidewalk. In summarizing the reasons for its holding, the opinion below lists a number of considerations pertinent to public forum doctrine: "the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas' network of

public sidewalks, and its dedication to public use under the Venetian's 1999 Agreement with the Department." Pet. App. 19a. Only the last of those depends in any way on interpreting the 1999 Agreement. The remaining factors all relate to the physical and functional characteristics of Venetian's private sidewalk, and have nothing whatsoever to do with the terms of the 1999 Agreement. But by placing principal weight on the supposed physical and functional resemblance of Venetian's sidewalk to a government-controlled "public forum," the opinion below – entirely apart from its interpretation of the 1999 Agreement – conflicts with the state action decisions of this Court and other courts.[3] And without the weight of those factors, the result below could not stand, as the circumstances do not implicate the narrow situations in which a private entity's control of expressive activity on its own property is subject to the First Amendment. *See infra* at 9-10.

2. The 1999 Agreement not only fails to present any basis for denying certiorari; but the terms of the agreement in fact *bolster* the case for granting review. That is because, as a result of the Ninth Circuit's opinion below, a property owner's clear preservation of its private property rights will be of no consequence if its property bears a physical and

---

[3] *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action"); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972) (rejecting "suggestion that privately owned streets and sidewalks of a business district . . . are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"); *United Auto Workers, Inc. v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 (4th Cir. 1995) ("It is not enough to establish state action . . . that an owner opens up his property for use by the public in general."); *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) ("[I]n determining whether the First Amendment protects petitioning or other political activity on private property, the test is not whether that property amounts to the 'functional equivalent' of a public forum.").

functional likeness to a government-controlled public forum. *See* Pet. 23-29. In those circumstances, the private entity will be treated as the government and its property will be treated as public property, notwithstanding the entity's specific protection of its rights as property owner.

After all, it is difficult to imagine how Venetian could more clearly have preserved its property rights and reinforced that there was no dedication of its property to the public: the agreement unfailingly specifies that the sidewalk is "private," it emphasizes that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," it confirms that the State "is not taking any private property interest," it assigns to Venetian all responsibility for maintaining the sidewalk and all liability arising from its use, and it makes clear that any dedication of a right-of-way could only arise in the future in the event that Venetian removed or abandoned its private sidewalk, which (undisputedly) has not occurred. Pet. App. 20a-22a. But the opinion below nonetheless refuses to give effect to Venetian's unequivocal preservation of its property rights, based on the private sidewalk's perceived functional and physical resemblance to a government-controlled public forum. The Ninth Circuit's misplaced reliance on public forum doctrine, to the point of dismissing altogether a private entity's explicit protection of its property rights, calls for this Court's review.[4]

---

[4] The efforts of the Unions and ACLU to defend the Ninth Circuit's interpretation of the agreement are wholly unpersuasive. For instance, while the agreement is recorded and binding on successors (*see* Unions Opp. 1), development agreements containing land use conditions are recorded and made binding on successors as a matter of course, regardless of whether they dedicate property to the public (for instance, even if they simply require set-back areas or landscape buffering). *See* Nev. Rev. St. § 278.0203(2). Also, any reliance on selected responses of Venetian's counsel in a hearing in the district court is entirely misplaced (*see* Unions Opp. 2-4) in view of the district court's conclusion that Venetian pre-

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS AND IS INCORRECT ON THE MERITS.

1. The Unions and ACLU make no serious effort to address the conflicts between the opinion below and the decisions of other courts. *See* Pet. 12-20. They devote the bulk of their attention to addressing the Nevada Supreme Court's decision in *S.O.C. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Unions Opp. 12-13; ACLU Opp. 12-14. It is true, as the Unions and ACLU observe, that the principal opinion in *S.O.C.* was not joined by a majority of the court. But the principal opinion announces the court's judgment, it was joined by more members of the court than any other opinion, and it is assumed by the other opinions to constitute a "majority" holding. *Id.* at 252 (concurrence); *id.* at 252-54 (dissent). And the apparent practice in Nevada is that, where a "quorum of . . . Justices has concurred in the judgment," the "reasoning and holding of the plurality view [is] binding unless and until overruled" by a majority of the court. *Craigo v. Circus-Circus Ents.*, 786 P.2d 22, 28 n.7 (Nev. 1990) (plurality). At the very least, the conflict between the principal opinion in *S.O.C.* and the Ninth Circuit's decision below has given rise to a great deal of confusion.[5]

In any event, the Unions and ACLU essentially do not

---

served its full private property rights, the Unions' written concession that the agreement preserves Venetian's right to exclude, and the Government Officials' acknowledgement that there is no public right-of-way on the sidewalk. *See* Pet. 28 n.14. The Ninth Circuit's contrary conclusion that the agreement does dedicate a right-of-way to the public is inexplicable, and confirms that the court's overriding concern is with whether the property, although privately owned and controlled, bears a physical and functional resemblance to a government-controlled public forum.

[5] *See* Steve Sebelius, *The politics of sidewalks*, Las Vegas Review-Journal (Jan. 3, 2002) (available at http://www.lvrj.com/cgi-bin/printable.cgi?/lvrj_home/2002/Jan-03-Thu-2002/opinion/17789951.html).

deal with the broader conflicts addressed at length in the petition. In particular, the opinion below cannot be squared with decisions recognizing the irrelevance of public forum standards to the antecedent question of state action (*see* Pet. 12-16), or with decisions establishing that a private entity's control of expressive activity on its own property implicates the First Amendment only in exceptional circumstances involving the equivalent of a "company town" (*see* Pet. 16-19). The sole contention of the Unions and ACLU in respect to those decisions is that this case involves a "thoroughfare" sidewalk that connects public sidewalks on either side, as opposed to an internal walkway or a sidewalk used principally for ingress and egress. *See* Unions Opp. 11; ACLU Opp. 12. As the petition explains (*see* Pet. 14, 18), however, the distinction in public forum doctrine between thoroughfare and non-thoroughfare sidewalks is entirely irrelevant to the antecedent question of state action. Until the opinion below, no decision had suggested otherwise.

2. The Unions and ACLU fare no better in their effort to justify the Ninth Circuit's decision on the merits. They place principal reliance on this Court's opinion in *Evans v. Newton*, 382 U.S. 296 (1966). *See* Unions Opp. 10-11; ACLU Opp. 9-11. Contrary to the view of the Unions and ACLU, however, *Evans* in no way stands for the proposition that the operation of a privately owned park for recreational purposes is inherently a municipal function that subjects the private owner to constitutional constraints. "[A]ny such broad doctrine," this Court has explained, could not be squared with "the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 n.8 (1978). *Evans* instead "rests on a finding of ordinary state action in extraordinary circumstances," in that "the transfer of title" to the park from the city "to private trustees" did not alter "the actual involvement of the city in the daily maintenance and care of the park." *Id.* Here, by contrast,

there is no government involvement in the maintenance and control of Venetian's private sidewalk: indeed, the 1999 Agreement explicitly absolves the State of any responsibility in that regard. *See* Pet. App. 20a (¶¶ 4-5).

The reliance of the Unions and ACLU on *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995) is misplaced for essentially the same reasons. *See* Unions Op. 8, 10-11; ACLU Opp. 10-11. In *Brentwood Academy*, the "pervasive entwinement of public institutions and public officials in [the] composition and workings" of a "nominally private" association persuaded the Court to treat the association as a state actor subject to constitutional requirements. 531 U.S. at 298. *Lebron* is to the same effect. There, the Court found that Amtrak is a government actor constrained by the First Amendment because the government created the company to promote governmental objectives and controls the company's operations through its authority to appoint a majority of the company's directors. *See* 513 U.S. at 394-400. Here, of course, no governmental body controls Venetian's operations or participates in its decision-making, including in its management and control of its private sidewalk.

The relevant state action cases instead are the line of decisions applying *Marsh v. Alabama*, 326 U.S. 501 (1946), which the Unions and ACLU do not address. Here, as in those cases, Venetian possesses state law rights as private property owner to restrict the use of its private sidewalk for expressive activity. *See supra* at 3-4. The question is whether Venetian nonetheless might be required by the First Amendment to allow protests and picketing on its private sidewalk. The clear answer is no: privately owned property can "be treated as though it were public" for purposes of subjecting the private owner to First Amendment constraints only if the "property has taken on *all* the attributes of a town,

i.e., residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block." *Flagg Bros., Inc. v. Brooks*, 436 U.S at 159 (emphasis in original) (internal quotation marks omitted). There is "nothing in *Marsh* which indicates that if [only] one of those features is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (quoting *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 322-23 (1968) (Black, J., dissenting)).[6]

But that is exactly the effect of the Ninth Circuit's decision below – it forces Venetian to make room on its own private sidewalk for protests and picketing deliberately designed to injure its own commercial interests. That outcome is flatly prohibited by this Court's decisions: "'To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.'" *Id.* (internal quotation marks omitted). The contrary determination of the opinion below warrants this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

---

[6] *Cf. Flagg Bros.*, 436 U.S. at 115 (explaining that the Court's decision in *Hudgens* "adopt[s] Mr. Justice Black's interpretation of the limited reach of *Marsh*").

Respectfully submitted,

SAMUEL S. LIONEL
DAVID N. FREDERICK
LIONEL, SAWYER & COLLINS
1700 Bank of Amer. Plaza
300 South Fourth Street
Las Vegas, NV 89101
(702) 383-8888

WILLIAM T. COLEMAN, JR.
WALTER E. DELLINGER
(Counsel of Record)
SRI SRINIVASAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioner